BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re: Henry R. Stevenson, Jr. Individually And as Owner of Parkwood Land Company	)
United States Environmental Protection Agency, Region 6	)
Dkt. No. CWA-06-2010-2708	)

APPEAL BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

Henry R. Stevenson, Jr., Individually and as Owner of Parkwood Land Company, appeals from an Initial Decision for violations of §309(a) of the Clean Water Act, 33 U.S.C. §1319(a) issued February 11, 2013. For the reasons stated below, the Initial Decision is in error because (1) The Environmental Protection Agency lacks jurisdiction under the provisions of the Clean Water Act; (2) the administrative court's decision that the "discharges of fill associated with the staging area/truck ramp and the truck turnaround, totaling 1.26 acres were not authorized by NWP 3" were arbitrary and capricious; and (3) the penalty assessed against Respondent by the administrative court improperly utilized Clean Water Act §309(g) guidelines based upon the evidence provided.

ISSUES PRESENTED FOR REVIEW

A. The Corps and EPA lack jurisdiction over the subject property.

B. The Administrative Court's decision that the discharges were not authorized by NWP 3 were not supported by the evidence.

FACTUAL AND PROCEDURAL BACKGROUND

On or about October 11, 2006, Mr. Henry R. Stevenson, Jr., Individually and as owner of Parkwood Land Company (hereinafter, "PLC") submitted a packet to the U.S. Army Corps of Engineers' Galveston District (hereinafter "Corps" or "The Corps") requesting verification of a wetland delineation completed by GTI Environmental, Inc. (hereinafter "GTI") on behalf of PLC. In its report, GTI stated that "[t]he investigation was conducted for the purpose of determining the existence and approximate extent, if any, of waters of the United States (jurisdictional waters), included wetlands, within the +/- 79 acre tract, which would be subject to regulation under §404 of the Clean Water Act." The project site is located north of Interstate 10 and east of the Neches River, near Rose City, Orange County, Texas (hereinafter "the site").

After completing its initial review of the GTI determination, the Corps found that the wetland delineation map, included with GTI determination documents needed to be revised. GTI submitted the revised delineation map to the Corps on December 6, 2006. The Corps then issued a preliminary jurisdictional determination finding 72 of the 79 acre parcel as wetlands that are subject to the Corps' jurisdiction under §404 of the Clean Water Act.

The Corps subsequently issued Permit Number SWG-2007-84-RN (D-19279) to PLC in order to repair portions of the levee on the property. According to the Corps letter granting the permit:

> "Our review of a 1947 survey showed that the property was originally used for dredge-material disposal and is surrounded by a containment levee. According to your project description, this levee is eroding and requires repairs. Since the levee was built prior to the inception of Section 404 of the Clean Water Act (CWA) and Section 10 of the Rivers and Harbors Act of 1899 plus the fact jurisdictional activities that have occurred prior to July 19, 1977, are authorized (grandfathered) by the NWP, the levee is considered to be previously authorized and can be repaired pursuant to NWP 3."[1]

[1] The entire parcel which is the subject of this appeal is surrounded by a 13' levee on all sides.

On or about November 17, 2010, PLC received a letter from the Environmental Protection Agency (hereinafter, "EPA") regarding "[t]he discharge of fill material into waters of the United States without a permit." A meeting with members of the EPA and the Corps occurred on the site on or about December 9, 2010.

On or about April 17, 2012, the Regional Judicial Officer granted a Motion for Accelerated Judgment as to liability on a Class I Penalty Action under Clean Water Act ("CWA") §309(g). The decision denied the Motion as to Penalty Assessment due to lack of evidence. Both Complainant and Respondent filed Supplemental Motions and an evidentiary hearing was conducted on or about November 14, 2012.

ARGUMENT

I. The U.S. Corps of Engineers lacks jurisdiction over the subject property.

Congress passed the Clean Water Act (hereinafter "CWA") in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251. To that end, the CWA prohibits the discharge of pollutants into navigable waters. *See id*.; §§1311(a), 1362(12)(A). The CWA defines navigable waters as "the waters of the United States, including the territorial seas." 33 U.S.C. §1362 (7). Although the Corps initially construed this definition to cover only waters navigable in fact, "in 1975 the waters of the United States' to include not only actually navigable waters but also tributaries of such waters" and "freshwater wetlands that were adjacent to other covered waters." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123-24 (1985).

In *Riverside Bayview Homes*, the U.S. Supreme Court upheld the Corps' determination that it had jurisdiction over wetlands adjacent to navigable waters. *Id* at 139. Even though the plain language of the statute did not compel this conclusion, the Court explained that by including a broad definition of "navigable waters" in the CWA, Congress "evidently intended to…exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classic understanding of that term." *Id* at 133. It was further reasoned by the Court that the Corps' decision to include wetlands within it jurisdiction was a reasonable one, given wetlands' critical importance to the health of adjacent waters. *Id* at 133-34.

The Supreme Court again interpreted the CWA term "navigable waters" in *Solid Waste Agency of Northern Cook County v. United States Corps of Engineers*, 531 U.S. 159 (2001)

(hereinafter "*SWANCC*"). In *SWANCC*, the Court considered whether "isolated ponds, some only seasonal, wholly located within two Illinois counties, fell under [the CWA's] definition of 'navigable waters' because they served[d] as habitat for migratory birds." *Id* at 171-72. The Court held that these waters were simply too far removed from any navigable waters to be included within that term. *Id*. To distinguish these isolated ponds from the wetlands it considered in *Riverside Bayview Homes*, the Court explained, "]i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." *Id* at 167.

Five years later, in *Rapanos v. U.S.*, the Supreme Court revisited the issue of the Corps' jurisdiction over adjacent wetlands. 547 U.S. 715 (2006). Although continuing to recognize the validity of the *Riverside Bayview Homes* decision, the Court was unable to provide a clear, blue-line decision regarding jurisdiction. Instead, a fractured Court proposed two different ways to limit the reach of it earlier ruling so as not to allow jurisdiction over wetlands which were remote or lacked a connection to "navigable waters."

The *Rapanos* plurality suggested that wetlands should only fall within CWA jurisdiction when they (1) are adjacent to a "relatively permanent body of water connected to traditional interstate navigable waters," and (2) have a "continuous surface connection with that water." *Id* at 742 (hereinafter "Plurality Opinion"). Justice Kennedy, concurring, found this test too limiting. Instead, he borrowed language from *SWANCC* to establish an alternative new test for jurisdiction over adjacent wetlands. *Id* at 779, 782. The dissent, which drew four votes, found both of these tests too stringent. In the words of the Chief Justice, "[i]t is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the

reach of the CWA. Lower courts and regulated entities will have to feel their way on a case-by-case basis." *Id* at 758.

In its short life, *Rapanos* has indeed satisfied any "bafflement" requirement. The first court to decide what opinion was controlling decided to ignore all of them and instead opted for earlier circuit precedent which it felt was clearer and more readily applied. *United States v. Chevron Pipe Line Co.*, 437 F.Supp.2d 605, 613 (N.D. Tex. 2006). The Courts of Appeal have similarly been perplexed and scattered in opinion. The Ninth Circuit has stated that Justice Kennedy's test apples "in most instances", *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993, 1000 (9th Cir. 2007), while the Eleventh Circuit has held that the CWA's coverage may be established *only* under this test. *United States v. Robinson*, 505 F.3d 1208, 1219-22 (11th Cir. 2007). By contrast, the First and Seventh Circuits, though differing somewhat in their analyses, have followed Justice Stevens' (the dissent) advice and held that the CWA confers jurisdiction whenever *either* Justice Kennedy's or the Plurality Opinion's test is met. *United States v. Johnson*, (467 F.3d 56, 60-66 (1st Cir. 2006); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006).

Unfortunately, the Fifth Circuit, which provides jurisdiction over the site, has not addressed this issue since the issuance of *Rapanos*.

a. *Rapanos* – Plurality Test

Following the Plurality Opinion in *Rapanos* requires the EPA to exhibit that the site property (1) is adjacent to a "relatively permanent body of water connected to traditional interstate navigable waters," and (2) has a "continuous surface connection with that water." In granting Accelerated Judgment to Complainant, the Regional Judicial Officer admits that "Complainant does not rely on Justice Scalia's plurality opinion in this matter and Respondent's

claim the tract's wetlands, which lack a continous surface connection to the neches River, could not meet the jurisdictional tests set forth in that opinion." Accelerated Decision at 6. Instead, the Administrative Court relies upon the Environmental Appeals Board's previous holding in *In Re: Smith Farm Enterprises* which reads:

> "Following the advice in Justice Stevens' dissent in *Rapanos*, the lead of the U.S. Circuit Courts of Appeal for the First and Eighth Cicuits, and the position of the United States in post-*Rapanos* appeals, the Board determines that CWA jurisdiction lies with EPA if either the Plurality's or Justice Kennedy's test is met." In Re: Smith Farm Enterprises ____ E.A.D. _____ 1010 WL 4001418 (September 20, 2010).

It is important to note here, however, by granting an Accelerated Decision in favor of Complainant regarding jurisdiction, the Administrative Court has failed to apply the opinions of the U.S. Supreme Court, as noted above, or apply an interpretation of those standards issued by the U.S. Court of Appeals, 5th Circuit which provides rulings for the location of the subject property.

The Plurality Opinion notes that without a clearly defined hydrological connection, the ability of the U.S. Corps of Engineers and EPA to assert jurisdiction when there is none is prevalent. *See* Rapanos, 547 U.S. at 728. The Plurality Opinion states:

> "some of the Corps' district offices have concluded that wetlands are 'adjacent' to covered waters if they are hydrologically connected 'through directional sheet flow during storm events' … or if they lie within the '100-year floodplain' of a body of water — that is, they are connected to the navigable water by flooding, on average, once every 100 years. Others have concluded that presence within 200 feet of a tributary automatically renders a wetland 'adjacent' and jurisdictional. And the Corps has successfully defended such theories of 'adjacency' in the courts, even after *SWANCC's* excision of 'isolated' waters and wetlands from the Act's coverage. One court has held since *SWANCC* that wetlands separated from flood control channels by 70-foot-wide berms, atop which ran maintenance roads, had a 'significant nexus' to covered waters because, *inter alia*, they lay 'within the 100 year floodplain of tidal waters.' *Baccarat Fremont Developers, LLC* v. *Army Corps of Engineers*, 425 F.

> 3d 1150, 1152, 1157 (CA9 2005). In one of the cases before us today, the Sixth Circuit held, in agreement with'"[t]he majority of courts,' that 'while a hydrological connection between the non-navigable and navigable waters is required, there is no `direct abutment' requirement' under *SWANCC* for ''adjacency.' 376 F. 3d 629, 639 (2004) (*Rapanos II).* And even the most insubstantial hydrologic connection may be held to constitute a 'significant nexus.' One court distinguished *SWANCC* on the ground that 'a molecule of water residing in one of these pits or ponds [in *SWANCC*] could not mix with molecules from other bodies of water' — whereas, in the case before it, 'water molecules currently present in the wetlands will inevitably flow towards and mix with water from connecting bodies,' and '[a] drop of rainwater landing in the Site is certain to intermingle with water from the [nearby river].' *United States* v. *Rueth Development Co.*, 189 F. Supp. 2d 874, 877-878 (ND Ind. 2002)." *Rapanos* 547 U.S. at 728-29.
>
> It is for this reason, Justice Scalia states in the Plurality Opinion that
>
> "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a 'significant nexus' in *SWANCC.* 531 U. S., at 167. *Id* at 742.

By adopting a view of *Rapanos* that ***either*** the Plurality Opinion or Justice Kennedy's test meets the grounds for jurisdiction incorrectly interprets the test and substitutes the opinions of a single Justice as "the law of the land." Further, without a supporting ruling by the 5th Circuit, the Regional Judicial Officer substitutes the opinions of courts who lack jurisdiction over the subject property as "the law of the land." *Id.*

PLC has stipulated that the Neches River flows adjacent to the site; however, the site and the Neches River, as previously noted, are separated by a thirteen-foot-high levee. The Corps, in a Memorandum for File dated July 5, 2007, states, by their own admission, that "there is no hydrological connection or breaks in the levee." *See* Exhibit "A."

While there is no dispute regarding the Neches River and requirement #1 above, there is no "continuous surface connection with that water" or "hyrdrological connection" as required by the Plurality Opinion in *Rapanos*. *See Rapanos*, 547 U.S at 742.

b. *Rapanos* – Kennedy's Significant Nexus Test

Justice Kennedy states, "[a]s applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone. That is the holding of *Riverside Bayview*. *Rapanos* 547 U.S. at 780.

While Justice Kennedy provides learned insight into his reasons for concurrence, reasons why the Plurality Opinion is too restrictive, and the dissent's opinion is too broad, Justice Kennedy's concurring opinion fails to note that the Plurality Opinion overturns portions of *Riverside Bayview*, and for good reason. The Court's reasoning in *Riverside Bayview* was founded upon the assumption that adjacency "significantly affects the chemical, physical, and biological integrity" of the navigable (or semi-navigable) waterway. *See id* at 755. When Justice Scalia stated, "[w]etlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem of *Riverside Bayview,* and thus lack the necessary connection to covered waters that we described as a 'significant nexus' in *SWANCC*," the intention of the Plurality Opinion was to provide a clear test for establishing a boundary and to "square" the Court's previous two opinions. *See* 531 U. S. at 167.

There are two issues with utilizing Justice Kennedy's approach. First, as previously noted, utilizing Justice Kennedy's approach ***alone*** interprets a Supreme Court opinion as that of only one justice. Second, "adjacency" can be an issue which is easily manipulated.

For example, let us take a subject property that is bordered by a navigable waterway to its east and a property, not initially subject to jurisdiction and owned by another person or entity, to its west. The western parcel is not "adjacent" because there is another property between it and the navigable waterway. Does the western property become subject to jurisdiction if the owner of the subject property purchases it? What if the subject property is subdivided with a boundary running north and south? Does the Corps lose jurisdiction over the western subdivided property because it is no longer adjacent?

The utilization of Justice Kennedy's significant nexus test and the use of *Riverside Bayview* in an absence of consideration for either the Court's holding in *SWANCC* or Justice Scalia's Plurality Opinion and the implications of same, minimizes two Supreme Court opinions for the sake of one.

c. Rapanos – Hydrological Connection Required

Without a hydrological connection, there can be no jurisdiction. *See Rapanos* 547 U.S. at 728-29. Mere adjacency to determine jurisdiction assumes which are not necessarily true and incorrectly interprets *SWANCC* or Justice Scalia's Plurality Opinion. Therefore, Respondent's property, which is fully and completely separated from the Neches River by a thirteen (13) foot levee (and has for nearly a century), which the Corps of Engineers agrees has no hydrological connection with the Neches River, is not subject to jurisdiction under the Act.

II. The Administrative Court's decision that the discharges were not authorized by NWP 3 were not supported by the evidence.

In the Intitial Decision, the Regional Judicial Officer notes that there were differences between the pre-construction notification and the Corps' "enclosed three sheet project plans." Initial Decision at 4. In fact, the Decision states, "It would have been impossible for Resondents to 'proceed with the repair of the existing levee as proposed in your December 11, 2006 letter' while complying 'with the enclosed three-sheet project plans." *Id.* The pre-construction letter provided to Respondent by the Corps (and utilized as the issuance of NWP 3 for the project) allows for "minor deviations due to changes in construction techniques, materials, or the like." The Regional Judicial Officer, while "[e]ven allowing for the ambiguity of that letter" still concluded that the "discharges of fill" were "not authorized" under the issued permit. *Id* at 6.

The Decision further states that although the Decision fines Respondent $7,500 for his "violations," "[t]hese are not, however, particularly serious violations." *Id*. Respondent wonders if he has the same definition of the term "serious" as the Regional Judicial Officer.

The Decision further amplifies the "not serious" nature of the violations by noting the Complainant's key witness, John Davidson, testified the Corps "would have likely have authorized the fill discharges associated with the truck ramp/staging area and truck turnaround under NWP 33 had Respondent's consultant identified them in the pre-construction notification and specifically requested coverage under that NWP." *Id.*

a. There was no evidence presented that supported the fact that Respondent discharged fill that was not in accord with the pre-construction notification.

Respondent's testimony and exhibits indicate that the diagrams forwarded as part of the pre-construction notification call for the discharge of fill "10 feet behind the new OHWM (i.e.

ordinary high water mark) by pulling the remaining portions of the existing levee back away from the shoreline. Ex. R-5 at 4-5. Mr. Davidson, upon cross-examination could not testify as to the dimensions of the fill on the inside portion of the levee. Transcript at 100. Kristen Shivers, testifying on behalf of the Corps of Engineers could not, upon cross-examination, testify as to the dimensions of the fill on the inside portion of the levee. Transcript at 136.

Further, Ms. Shivers, while admitting that the GPS unit and computer program utilized to outline the boundaries of the "violations" incurred "erroneous data," still testified that the data used to outline the width and breadth of Respondent's violations was proper. Transcript at 130-135.

In short, no witness on behalf of Complainant could testify that Respondent placed fill beyond the ten foot indicated in the pre-construction notification.

b. The NWP 3 permit authorization letter allowed for "minor deviations."

The Decision holds that "minor deviations" "references the levee's original construction, not the work proposed in the pre-construction notification. Even allowing for the ambiguity of that letter, I conclude the discharges of fill associated with the staging area/truck ramp and the truck turnaround, totaling 1.26 acres, were not authorized by NWP 3 and thus violated CWA §301 (a). Initial Decision at 6.

The Regional Judicial Officer, noting the "ambiguity," fails to account that the plain language of the NWP 3 authorization letter allows for the discharge of fill – if it exceeded the ten feet allotted for in the pre-construction notification. What accounts for a "minor deviation" was also a puzzle to the Complainant's witnesses.

Ms. Shivers testified:

Q: So tell me, since we calculated acreage, how many acres is acceptable and how many acres is unacceptable under the minor deviation standard that we're talking about in Nationwide 3? How much is too much?

A: It's determined on a case by case basis. Transcript 139-140.

Mr. Davidson testified:

Q: If my levee is not wide enough and strong enough to handle the trackhoe that I need to put up there to put the dirt on the levee, can I widen that under Nationwide No. 3 in order to accept that and have that be as a part of the minor deviation due to construction techniques, materials or the like?

A: It depends on how wide – I mean, how wide you're going to widen it. I mean, if you're going out two feet, as I discussed earlier, that's a minor deviation. If you're going out 50 feet, that is not a minor deviation. Transcript at 66-67.

While the Complainant's witnesses cannot testify as to how far Respondent placed fill on the inside portion of the levee, they further cannot delineate as to what a "minor deviation" is as noted in the NWP 3 letter issued to Respondent. The evidence presented by Complainant cannot show and does not show (1) Respondent discharged fill that was not in accord with the pre-construction notification and (2) was not within the language of a "minor deviation" as provided Respondent in the NWP 3 permit issued to him.

CONCLUSIONS

Following the U.S. Supreme Court's opinion in *Rapanos* and the subsequent attempts to interpret this holding, the ***ONLY*** means by which the Corps or EPA can confer jurisdiction upon the site is through use of the opinion of a single justice. This method discounts the opinion issued by four justices and substitutes the opinions of one. Therefore, by granting Accelerated Judgment on liability to Complainant, the Administrative Court utilizes a legal standard not recognized by the 5th Circuit and interprets a Supreme Court opinion of a single justice.

Even assuming that jurisdiction exists, there was no evidence presented that (a) Respondent discharged fill that was not in accord with the pre-construction notification provided

to the Corps or that (b) if Respondent did so, that such discharge was not in accord with the "minor deviations" provisions issued in the NWP 3 permit provided to Respondent.

These premises considered, PLC requests this Environmental Appeal Board vacate the Initial Decision issued by the Regional Judicial Officer on February 11, 2013.

Respectfully Submitted,

THE KIBLER LAW FIRM

/s/ Charles M. Kibler, Jr.

Charles (Chuck) Kibler, Jr.
State Bar No. (TX): 24036900
765 N. 5th Street
Silsbee, Texas 77656
(409) 373-4313
(888) 720-1177 Facsimile
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Charles M. Kibler, Jr., certify that a true and correct copy of Respondent's Appeal Brief was provided to the following persons on the date and manner stated below on March 13, 2013:

Russell Murdock Certified Mail Return Receipt Requested
U.S. Environmental Protection Agency
Office of Regional Counsel
1445 Ross Avenue
Dallas Texas 75202-2733

Lorena Vaughn Certified Mail Return Receipt Requested
U.S. Environmental Protection Agency
Regional Clerk
1445 Ross Avenue
Dallas Texas 75202-2733

Environmental Protection Board
Clerk of the Board
Environmental Appeals Board
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-001

Via Electronic Submission